



The New Legal Realism

Citation

Cass Sunstein & Thomas Miles, The New Legal Realism, 75 U. Chi. L. Rev. 831 (2008).

Published Version

http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/75.2/75_2_Miles_Sunstein_Realism.pdf

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:10875732>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

The New Legal Realism

Thomas J. Miles[†] & Cass R. Sunstein^{††}

INTRODUCTION

In 1931, Karl Llewellyn attempted to capture the empirical goals of the legal realists by referring to early “efforts . . . to capitalize the wealth of our reported cases to make large-scale quantitative studies of facts and outcome.”¹ Llewellyn emphasized “the hope . . . that these might develop lines of prediction more sure, or at least capable of adding further certainty to the predictions based as hitherto on intensive study of smaller bodies of cases.”² But Llewellyn added, with apparent embarrassment: “I know of no published results.”³

We are in the midst of a flowering of “large-scale quantitative studies of facts and outcome,” with numerous published results. The relevant studies have produced a New Legal Realism—an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.⁴ Our goals in this essay, prompted by Peter Strauss’s illuminating discussion,⁵ are to offer a few general remarks on the New Legal Realists and to place those remarks in the context of some of the central questions in administrative law.

[†] Assistant Professor of Law, The University of Chicago.

^{††} Karl N. Llewellyn Distinguished Service Professor, The Law School and Department of Political Science, The University of Chicago. We are grateful to Susan Bandes, Elizabeth Foote, Jacob Gersen, Brian Leiter, Anup Malani, Richard McAdams, Elizabeth Mertz, Jonathan Nash, Eric Posner, Adam Samaha, Larry Solum, David Strauss, Noah Zatz, and participants in a work-in-progress lunch at The University of Chicago Law School for valuable comments. We are also grateful to the Chicago Judges Project, and in particular to Dean Saul Levmore, for relevant support.

¹ Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 Harv L Rev 1222, 1243–44 (1931).

² Id. at 1244.

³ Id.

⁴ We are hardly the only people to use this term. As best we can determine, the term “New Legal Realism” first appears in Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw U L Rev 251 (1997). Cross’s understanding of the New Legal Realism is close to ours. A great deal of other work, some of it much broader, has also claimed that mantle. See note 16. For a helpful overview with varied work, see New Legal Realism, <http://www.newlegalrealism.org> (visited Apr 16, 2008).

⁵ See generally Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 U Chi L Rev 815 (2008).

I. LAW AND POLITICS

A. From Old to New Realism

Llewellyn wrote in reaction to the formalist view that law, as expressed in statutes and precedents, determined the outcomes of particular cases.⁶ He believed that, much of the time, existing law did not compel particular outcomes, in the sense that the available sources would not require a rational and fair-minded judge to reach only one result. And at times, the law itself was contradictory: “[I]n any case doubtful enough to make litigation respectable[,] the available authoritative premises . . . are at least two, and [] the two are mutually contradictory as applied to the case at hand.”⁷ For Llewellyn, the indeterminacy, sometimes even incoherence, of law meant that “the personality of the judge” must to some degree explain case outcomes.⁸ In his view, “our government is not a government of laws, but one of laws through men.”⁹

To modern readers, Llewellyn’s suggestions are far too crude. The personality of the judge surely can matter, but what, exactly, is meant by “personality”? More fundamentally, whether ours is “a government of laws,” and what it means for a system to be “one of laws through men,” are partly empirical questions.¹⁰

Empirical work on judicial behavior is not, of course, a new endeavor. An entire subfield of political science, known as “law and politics,” has contributed a large and valuable empirical literature investigating the influence of ideology on judicial outcomes.¹¹ Some early

⁶ See Brian Leiter, *American Legal Realism*, in Martin P. Golding and William A. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* 50, 51–52 (Blackwell 2005).

⁷ Llewellyn, 44 Harv L Rev at 1239 (cited in note 1). In the context of statutory interpretation, a famous reflection of this view is Llewellyn’s attempt to show that the canons of construction offset each other, producing contradiction and indeterminacy. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395, 401–06 (1950) (characterizing each canon of construction as a “thrust” that can be “parried” by an opposing canon of construction).

⁸ Llewellyn, 44 Harv L Rev at 1242 (cited in note 1). Llewellyn was not, however, the realist who most emphasized the personality of the judge; Jerome Frank probably deserves that characterization. We bracket the complexities here. For valuable discussion, see generally Leiter, *American Legal Realism* (cited in note 6).

⁹ Llewellyn, 44 Harv L Rev at 1243 (cited in note 1).

¹⁰ We say “partly” because some conceptual and normative analysis is necessary to establish what, exactly, will be tested, and how to evaluate what is found.

¹¹ See, for example, Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 117–41 (Oxford 2005) (analyzing judicial decisions since 1953 to conclude that the ideological association between presidents and their appointees’ voting records is stronger with respect to Supreme Court justices than courts of appeals judges); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 2 (Cambridge

contributions to this literature treat the influence of law (the legal model) as an empirical hypothesis, opposed to a competing hypothesis involving the influence of judicial ideology (the attitudinal model). These studies often reject the legal model in favor of the attitudinal model.¹² More recently, political scientists have given greater attention to the institutional context of judicial decisionmaking by positing and testing models of strategic behavior.

For their part, legal academics took little notice of “law and politics” political science. Perhaps they did so because the empirical methodology was unfamiliar and different from their own.¹³ But recently, the appetite for empirical work in general has grown rapidly among law professors, and empirical research within law schools has become so prevalent as to constitute its own subgenre of legal scholarship, “empirical legal studies.”¹⁴ In view of the importance of judicial decisions as a source of law and their centrality to both teaching and scholarship in law schools, it is unsurprising that much of the burgeoning empirical legal scholarship focuses directly on judicial rulings and their sources.¹⁵

2002) (arguing that American history is replete with “egregious” examples of partisan judicial policymaking).

¹² See Howard Gillman, *The New Institutionalism, Part I: More and Less than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, Am Polit Sci Assn L & Cts Section Newsletter 6, 6 (Winter 1996–1997) (describing “the reign of the attitudinal model”).

¹³ See Barry Friedman, *Taking Law Seriously*, 4 Perspectives on Polit 261, 261 (2006) (arguing that political science literature on judicial behavior “has not received nearly the attention it deserves” because it has ignored normative implications, overlooked the actual operation of legal institutions and actors, and failed to acknowledge the limitations of its data).

¹⁴ The most revealing developments here include the emergence of a new journal devoted solely to empirical studies, with the (unsurprising but descriptive) name, *Journal of Empirical Legal Studies*, and a new professional organization, The Society for Empirical Legal Studies. The causes of the renewed interest in empirical studies among law schools are intriguing and well worth sustained attention. We speculate that important factors in this change include the decline in the costs of computing and data gathering, the increasing presence on law faculties of people with postgraduate training in both law and social sciences, and the prevailing sense in certain interdisciplinary fields, particularly economic analysis of law, that empirical work rather than abstract theory now presents the greatest opportunities for contribution. These changes have likely mitigated or even eliminated some of the professional disadvantages of conducting empirical research. See Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J Legal Educ 323, 331–33 (1989) (listing reasons why empirical research runs counter to careerist objectives of legal academics, particularly untenured ones).

¹⁵ See generally, for example, Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U Chi L Rev 715 (2008) (concluding that the political ideology of the sentencing judge matters in federal criminal sentencing); Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford 2007) (analyzing decisions rendered by the federal appellate courts under a variety of conditions); Christina L. Boyd, Lee Epstein, and Andrew D. Martin, *Untangling the Causal Effect of Sex on Judging* (Second Annual Conference on Empirical Legal Studies, 2007) (analyzing sex discrimination suits to find significant sex-based effects in judicial decisionmaking); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114

We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.¹⁶ The New Legal Realists are conducting what Llewellyn and his peers only envisioned—“large-scale quantitative studies of facts and outcome” that assess the influence of the judicial personality on legal outcomes. We suspect that the new realist studies of judicial behavior will erode the distinctions between “law and politics” political science and “empirical legal studies.” Through its conferences and professional journals, economic analysis of law has long drawn contributions from both law faculties and economics departments. We hope, and are willing to predict, that the New Legal Realism will increasingly bring together scholarly efforts of both lawyers and political scientists; economists will play a substantial and probably growing role as well.

A distinguishing feature of the New Legal Realism is the close examination of reported cases in order to understand how judicial “personality,” understood in testable ways, influences legal outcomes, and how legal institutions constrain or unleash these influences. These inquiries represent an effort to test certain intuitive ideas about the indeterminacy of law, and to implement the (old-style) realist call for

Yale L J 1759 (2005) (studying cases from 1999–2001 to conclude that judges’ gender affected outcomes in sexual harassment and sex discrimination cases); Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St L J 491 (2004) (demonstrating that in religious freedom cases, the variables most saliently affecting outcomes were the religious beliefs of judges, claimants, and communities); James J. Brudney, Sara Schiavoni, and Deborah J. Merritt, *Judicial Hostility toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 Ohio St L J 1675 (1999) (analyzing appellate decisions reviewing NLRB decisions and concluding that a variety of demographic, professional, and educational characteristics impacted these decisions); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va L Rev 1717, 1727 (1997) (using environmental decisions as a data set in analyzing how judges’ ideology affects decisionmaking). The prefatory “for example” should be taken seriously; in the limited space of this reply, we do not attempt a comprehensive review of the relevant literatures. Apologies to the many whom we have omitted; our list is merely illustrative, and we have not included many valuable contributions.

¹⁶ We emphasize that others have used the phrase “New Legal Realism” to describe a broader set of interdisciplinary inquiries not limited to judicial decisionmaking. See, for example, the illuminating discussions in Stewart Macaulay, *The New versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 Wis L Rev 365, 385–86 (describing the New Legal Realism as involving “the law in action, . . . the gap between the law in the books and the actual practices of legal officials and the public in cases of disputes”); Howard Erlanger, et al, *Is It Time for a New Legal Realism?*, 2005 Wis L Rev 335, 337 (“[N]ew legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.”). It would certainly be possible to understand the form of realism we discuss here as a subpart of a broader conception of the New Legal Realism.

In contrast, still others label recent studies of judicial behavior as a part of “the new legal empiricism.” See, for example, Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U Ill L Rev 819, 822 (noting the “recent reemergence of legal empiricism, or what Professor James Lindgren has labeled ‘the new empiricism’”).

empirical study of how different judges decide cases by responding to the “stimulus” of each case. Political science has devoted much attention to the Supreme Court, a sensible choice given the Court’s importance. But the New Legal Realism tends to focus on lower federal courts because the random assignment of judges to cases is a sort of natural experiment that permits plausible causal inferences about the effect of judicial characteristics on outcomes.¹⁷

B. The Standard Pattern

The New Legal Realists are beginning to make progress on these questions because of increasing agreement about how to measure relevant aspects of the “personality of the judge” and the features of each case. What Llewellyn termed “personality,” the New Legal Realists have taken to mean the observable, personal characteristics of judges, such as their political affiliations, demographics, and prior professional experience.¹⁸ The goal is to develop testable hypotheses—and then to test them. Much more can and will be done, but much has been done already.

To date, the characteristics of the cases most commonly examined by the New Legal Realists are the types of litigants, the nature of their claims, and the procedural posture of the dispute. The New Legal Realism also seeks to capture the institutional context of judicial behavior; the New Legal Realists are interested in social influences, and especially collegial influences, on judicial votes. Dimensions of the institutional setting include whether a judge renders her decision while presiding alone or as a member of a panel, and if as a member of a panel, whether the copanelists have similar characteristics. An important stimulus—and sometimes an important constraint—is the law itself. Some legal scholars play up the role of legal constraints¹⁹ while others emphasize what they see as the decisive role of the values or

¹⁷ Some researchers are also investigating judges in state courts. See, for example, Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 14 (The University of Chicago Law & Economics Olin Working Paper No 357, Aug 2007) (analyzing the decisions of the highest court in each state for a three-year span in order to measure the “productivity, citation numbers, and independence” of appointed and elected judges). Much more remains to be done on this count; state courts are a fertile place for study, and little has been done to date.

¹⁸ But see Heise, 2002 U Ill L Rev at 833–36 & n 73 (cited in note 16) (describing early attempts to examine the personality of the judge from a psychological perspective).

¹⁹ Within the New Legal Realism, this is the tendency in, for example, Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal L Rev 1457, 1514 (2003) (concluding that legal precedent plays a larger role in judicial decisionmaking than do judges’ political ideologies, their desire to strategically limit external reactions to their decisions, or the self-interested behavior of the litigants).

commitments of particular judges.²⁰ Some of the old-style realists could be read to adopt the latter position,²¹ but they rested content with impressions and anecdotes, not with any kind of systematic study. By contrast, the New Legal Realists take these claims about legal reasoning as hypotheses, which can and should be tested. They want to know when and how law is indeterminate and thus exactly when and how “the personality of the judge” matters for outcomes.

To date, the question that has received the most attention from the New Legal Realists is the influence of a judge’s political ideology or attitudes.²² This question holds perennial interest because judicial ideology—usually proxied by the party of the appointing president²³—often appears influential in constitutional decisions, and it is a recurrent, even dominant, theme of media coverage of the Supreme Court. But do Republican appointees systematically differ from Democratic ap-

²⁰ Within the New Legal Realism, this is the tendency in, for example, Revesz, 83 Va L Rev at 1766–67 (cited in note 15) (construing data to argue that judges’ ideological views will affect their decisions unless they are sufficiently tempered by a strategic motivation to avoid higher court review). Revesz, by the way, played a highly significant role in spurring the New Legal Realism.

²¹ See, for example, Llewellyn, 44 Harv L Rev at 1224 (cited in note 1) (describing how legal realism attempts to expose the role of psychology in judicial action); Max Radin, *Statutory Interpretation*, 43 Harv L Rev 863, 885 (1930) (arguing that non-value-based methods of interpretation such as legislative history, purpose, and canons of construction cannot sufficiently explain statutory interpretation by courts). It would be a mistake, however, to suggest that realists as a whole believed that the values or commitments of particular judges explained outcomes. For a superb discussion, see generally Leiter, *American Legal Realism* (cited in note 6).

²² This issue is explored in many places. See generally, for example, William Landes and Richard A. Posner, *Judicial Behavior: A Statistical Study* (unpublished manuscript, 2007) (discussing whether a judge’s political voting behavior changes over her term of office and whether it depends on the ideological makeup of other judges on the court); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U Chi L Rev 823 (2006) (concluding, after empirical analysis, that judicial political ideology affects the application of *Chevron* deference); Cass R. Sunstein, et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Brookings 2006) (analyzing the effects of the political party of the appointing president on judicial panel voting in a variety of cases); Cross, 92 Nw U L Rev 251 (cited in note 4). The issue is also investigated in Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan L Rev 295, 369, 371, 410 (2007) (finding that political affiliation sometimes plays a role in federal court of appeals judges’ review of asylum cases).

²³ The appropriate measure of judicial ideology has been vigorously contested. Compare Lee Epstein and Gary King, *The Rules of Inference*, 69 U Chi L Rev 1, 87–89 (2002) (criticizing, among other things, the use of party affiliation of the appointing president as a measure of judicial ideology), with Gregory C. Sisk and Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 Nw U L Rev 743, 746–47 (2005) (noting that “[r]esearchers continually strive to refine statistical measures of ideology” but that “[b]eyond a nominee’s perceived or presumed ideology, the cumulative and multi-dimensional nature of each putative jurist’s character, judicial philosophy, personal attributes, and experiences must be considered”). See also Donald Braman and Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *How Law Knows* 93, 94 (Stanford 2007) (arguing that analyses of cultural cognition show that political and cultural values orient rather than motivate in reaching particular outcomes).

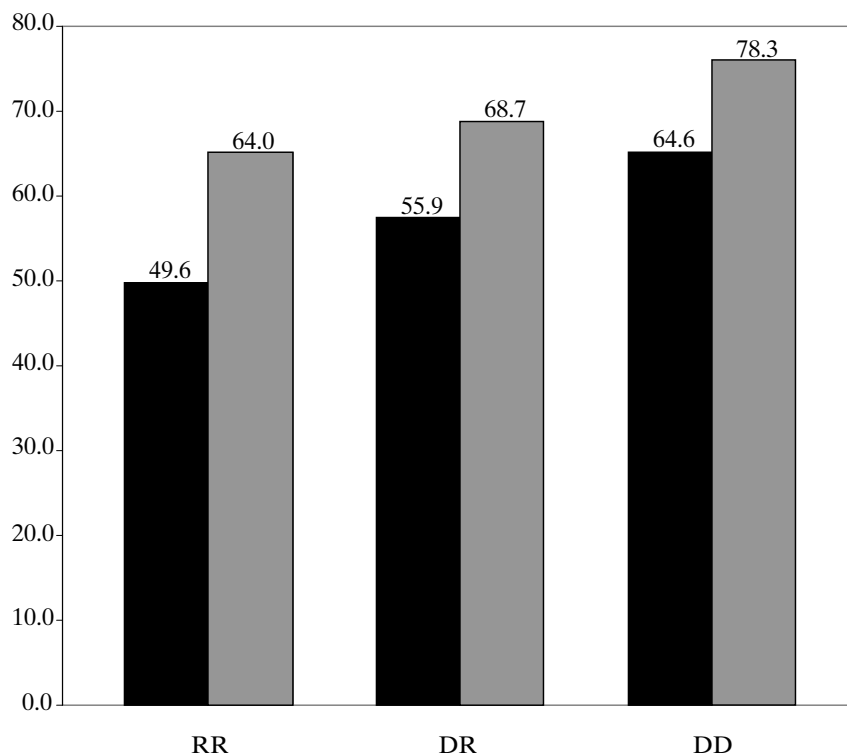
pointees? In what domains? It is reasonable to speculate that in ideologically contested domains—involving, for example, environmental protection, labor law, immigration, sex discrimination, abortion, and campaign finance law—the two sets of appointees will vote very differently. If so, how much do they differ? Does the party affiliation of the appointing president matter as much as it seems to in the domain of politics? Do the relevant differences persist in less ideologically contested domains?

If party effects can be found, does the institutional setting of decisionmaking matter as well? Much of the New Legal Realism has focused on federal appellate decisions. In federal circuit courts, judges sit on three-member panels, and the New Legal Realists have investigated whether the presence of a judge's colleagues on a panel influences her decisionmaking. It is reasonable to speculate that when Democratic appointees sit on three-judge panels consisting exclusively of Democratic appointees, their voting patterns will be unusually "liberal"—and that when Democratic appointees sit on three-judge panels with two Republican appointees, their voting patterns will be unusually "conservative." (Whether a decision counts as "liberal" or "conservative" can be assessed by standard if admittedly crude judgments, such as whether a disabled person or a woman wins in a discrimination case, or whether a restriction on abortion is upheld or struck down.) It is even reasonable to speculate that it might be possible to do pretty well in predicting judicial votes, in some areas, by asking about the political affiliation of the appointing president—and perhaps equally well by asking about the political affiliation of the president who appointed the two other judges on the panel. New Legal Realists describe the impact of the colleagues on an appellate panel on a judge's own votes as "peer effects" or "panel effects."

A good deal of evidence on these questions has recently emerged. In many domains, the basic pattern of judicial voting looks much like it does in the following figure, drawn from one study.²⁴

²⁴ Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U Chi L Rev 761, 793 figure 3 (2008) (analyzing data in NLRB and EPA cases).

FIGURE 1
LIBERAL VOTING RATES OF CIRCUIT COURT JUDGES
IN ARBITRARINESS REVIEW CASES BY PANEL COMPOSITION
AND BY PARTY OF APPOINTING PRESIDENT



Note: The darkly shaded bars indicate the validation rates of Republican appointees, and the lightly shaded bars indicate the validation rates of Democratic appointees.

In many areas of law, Democratic appointees cast liberal votes more often than Republican appointees do, whatever the partisan configuration of the panel. But the liberal voting rate typically increases with the number of copanelists who are Democratic appointees—and correspondingly falls with the number of Republican appointees.

Results of this kind have been found in so many diverse areas that they might fairly be described as the “Standard Pattern of Judicial Voting,” at least in ideologically contested cases.²⁵ In the Standard Pat-

²⁵ Thus the Standard Pattern can be found in many places in Sunstein, et al, *Are Judges Political?* at 20–23 (cited in note 22). See also Virginia A. Hettinger, Stefanie A. Lindquist, and Wendy L. Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Mak-*

tern, the political affiliation of the appointing president greatly matters to judicial votes. The observed panel effects are commonly interpreted as two behavioral responses. The first is *ideological dampening*: Republican appointees show fairly liberal voting patterns when sitting with two Democratic appointees; and Democratic appointees show fairly conservative voting patterns when sitting with two Republican appointees. The second is *ideological amplification*: Republican appointees show especially conservative voting patterns when sitting with two Republican appointees; and Democratic appointees show especially liberal voting patterns when sitting with two Democratic appointees.

Ideological dampening seems to be a kind of conformity effect, reminiscent of empirical findings to the effect that isolated people typically yield when confronted with the unanimous views of others.²⁶ Both Republican and Democratic appointees appear to show a conformity effect by issuing a kind of “collegial concurrence.” Ideological amplification seems to be a form of group polarization, reminiscent of empirical findings to the effect that like-minded people, engaged in deliberation with one another, end up at more extreme points in line with their predeliberation tendencies.²⁷ In the context of judicial behavior, the underlying mechanisms remain imprecisely understood, but at least it can be said that members of unified panels typically show more extreme voting patterns, in a way that fits with the general phenomenon of group polarization.

Importantly, the Standard Pattern is not universal. Republican appointees and Democratic appointees do not differ in their voting patterns in some areas in which significant differences might well be expected; examples include criminal appeals, property rights, congressional power under the Commerce Clause, and standing to sue.²⁸ Perhaps the law imposes a great deal of discipline in these domains, so that ideological differences cannot emerge; perhaps Republican and Democratic appointees do not much disagree in such areas. Moreover, panel effects are not present in the important domains of abortion and capital punishment. In those domains, judges apparently vote their convictions and are not influenced, at least in their conclusions, by the other judges on the panel.²⁹ A natural explanation is that here, judicial judgments are entrenched, and hence judges are not much affected by the votes and arguments of those of a different political party. (Nota-

ing 84–85 (Virginia 2006) (summarizing statistical studies showing judicial ideology as a statistically significant factor in decisions to dissent).

²⁶ See Solomon Asch, *Opinions and Social Pressure*, in Elliot Aronson, ed, *Readings about the Social Animal* 13 (W.H. Freeman 7th ed 1995).

²⁷ See Roger Brown, *Social Psychology: The Second Edition* 203–26 (Free Press 1986).

²⁸ Sunstein, et al, *Are Judges Political?* at 48–49 (cited in note 22).

²⁹ *Id* at 54–55.

bly, judges of the notoriously divided Sixth Circuit show essentially no panel influences. Republican appointees on that court are unaffected by Democratic appointees, and vice versa; the Sixth Circuit is the only court of appeals to show that pattern in that data.³⁰) In the domain of asylum cases, Republican and Democratic appointees show very different voting patterns on the Sixth Circuit and the Ninth Circuit, but not on the Third Circuit, suggesting that ideological differences may exist, or break out, in some places but not in others.³¹

Other New Legal Realist work has begun to investigate the role of other aspects of a judge's background, particularly the judge's demographic characteristics, such as race and sex. These results mirror the findings for partisanship or ideology in two ways. First, just as with partisanship, these characteristics have been found to influence a judge's own vote as well as those of other judges on the panel. Second, these judicial characteristics matter in certain legal contexts but not in others.

For example, a significant finding is that in sex discrimination cases, a judge's sex matters; female judges are more likely to vote in favor of plaintiffs, and male judges are more likely to vote in favor of plaintiffs if a female judge is sitting on the panel.³² In sexual harassment cases, there is a clear gender effect.³³ However, a judge's race does not exert a meaningful influence in employment discrimination cases, an area where one might predict race would be particularly salient. In contrast, race matters in voting rights cases; African American judges are more likely to vote in favor of plaintiffs, and white judges are more likely to vote in favor of plaintiffs if an African American judge is sitting on the panel.³⁴ (Another way to put these points is that white judges are less likely than African American judges to vote in favor of plaintiffs, and white judges are even less likely to vote in favor of plaintiffs if no African American judge is sitting on the panel.) Interestingly, a judge's sex does not matter in voting rights cases.³⁵

Still other work has started to investigate differences among courts of appeals. If the prospects of similarly situated litigants greatly

³⁰ Id at 63, 111.

³¹ Compare Ramji-Nogales, Schoenholtz, and Schrag, 60 *Stan L Rev* at 369 (cited in note 22) (finding no ideological differences on the Third Circuit in immigration cases), with Sunstein, et al, *Are Judges Political?* at 371, 409–11 (cited in note 22) (finding massive differences, in many areas, within all courts of appeals).

³² See Boyd, Epstein, and Martin, *Effect of Sex on Judging* at 2 (cited in note 15).

³³ Peresie, Note, 114 *Yale L J* at 1777 (cited in note 15) (graphing the probability of a pro-plaintiff decision in sexual harassment and sex discrimination cases against the judge's gender).

³⁴ See Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 *Colum L Rev* 1, 29–37 (2008).

³⁵ See id at 43.

vary from one federal court to another, something is probably amiss. A recent study asks:

But how about a situation in which one judge is 1820% more likely to grant an application for important relief than another judge in the same courthouse? Or where one U.S. Court of Appeals is 1148% more likely to rule in favor of a petitioner than another U.S. Court of Appeals considering similar cases?³⁶

To the extent that significant questions are being resolved quite differently in different courts of appeals, the rule of law is affronted, especially if the Supreme Court is unable or unwilling to ensure greater consistency.

C. Limitations and Unanswered Questions

Notwithstanding several advances in understanding judicial behavior, the New Legal Realism continues to have important limitations, and a great deal remains to be done. Some of these limitations involve data gathering. Others are conceptual and normative.

Most of the relevant studies are limited to published judicial opinions.³⁷ Such opinions may well be unrepresentative of the typical case, and if courts are more likely to publish difficult and controversial opinions,³⁸ the estimates from published opinions will likely overstate the actual effects of judicial ideology and other characteristics. A great deal might be learned by incorporating unpublished opinions into the analysis. But to the extent that an objective of the New Legal Realism is to understand the impact of judicial personality on law, rather than quotidian decisions lacking precedential value, published cases are relevant subjects of analysis. A special problem here is that publication practices are not uniform across circuits, and hence cross-circuit comparisons may be unreliable if unpublished opinions are excluded.

It also remains true that the current findings provide only fragments of the overall puzzle. We know something, for example, about judicial behavior in EPA and NLRB cases between 1996 and 2006.

³⁶ Ramji-Nogales, Schoenholtz, and Schrag, 60 *Stan L Rev* at 301 (cited in note 22).

³⁷ For a valuable exception, see generally *id.* (studying published and unpublished immigration cases heard by immigration judges, the Board of Immigration Appeals, and the circuit courts of appeals). On publication rates generally, see William L. Reynolds and William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 *U Chi L Rev* 573 (1981) (measuring publication rates and opinion lengths in the federal circuit courts).

³⁸ See, for example, Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J Legal Stud* 257, 277–81 (1995) (reporting the judicial characteristics that do not affect outcomes in cases representative of the average docket of federal trial courts).

But it would be much better to know about judicial behavior in a broader range of administrative law cases in that period, including, for example, cases involving the SEC, the OSHA, the FCC, and the FTC. It would be better still to be able to learn as well about cases from 1986 to 1996, and 1976 to 1986, and even 1946 to 1976. To what extent is the Standard Pattern found across agencies and across time? Even in the domain of administrative law, no one has explored the effects of party affiliation on purely procedural challenges to agency decisions. Suppose, for example, agency decisions are challenged for failure to comply with the procedural requirements of the Administrative Procedure Act.³⁹ Do Republican appointees show different voting patterns from Democratic appointees? Are the former more likely to accept a procedural challenge from (say) companies complaining about environmental regulation, and the latter from (say) the Sierra Club and the Natural Resources Defense Council? We suspect so, but we lack data.

Studies of race, sex, and disability discrimination cases remain badly incomplete, limited as they are to relatively brief periods of time. Many areas of law remain entirely unstudied in the standard terms, including, for example, antitrust, intellectual property, and bankruptcy. It would be useful to know in which areas of law and under what circumstances the judicial personality has the greatest (and the least) influence on decisions.

In addition, we continue to know only a small amount about what might be learned with respect to the effects of key aspects of judicial background on judicial voting. What is the impact of age or of number of years on the bench? Of service as (for example) a prosecutor or a corporate lawyer? Of religious background? (An especially intriguing question: are judges of certain religious backgrounds likely to rule differently in abortion cases, sex discrimination cases, and religion cases than are judges of other religions or of no religion?) How do sex and race affect behavior in multiple areas of the law? Are female appointees more likely to be pro-choice? In these domains, we glimpse only the tip of the iceberg.⁴⁰

Still more troubling is the fact that much of the New Legal Realism remains largely atheoretical. Our work in administrative law is vulnerable to just this criticism; our inquiry is simply whether judicial ideology matters to judicial votes in the context of *Chevron U.S.A. Inc v NRDC*⁴¹ and arbitrariness review cases. Though we have referred to

³⁹ 5 USC § 551 et seq (2000).

⁴⁰ See Cross, *Decision Making* at 25–28 (cited in note 15) (providing some analyses of these characteristics in a random sample of published appellate decisions).

⁴¹ 467 US 837 (1984).

the potential role of conformity effects and group polarization, the mechanisms generating panel effects remain inadequately understood.⁴² An exception to the absence of behavioral theory is the literature that employs rational choice models to predict how the possibility of review by higher courts, such as en banc review of a panel's decision, may influence a judge's decision. A core prediction of these analyses is that the risk of reversal by an unfriendly overseeing court may induce a judge to alter her vote or the legal basis of her decision.⁴³

A particular advantage of these models is that they generate (and test) predictions about a judge's strategic choice of the grounds for a decision. In so doing, they move beyond the focus on mere votes and come closer to Llewellyn's vision of studying the effect of judicial personality on legal reasoning in appellate decisions.⁴⁴ Even in the absence of explicit rational choice models, other researchers have begun to consider the application of particular legal doctrines, rather than a judge's votes, as a unit of analysis.⁴⁵ We think that a great deal might be learned by examining opinions, not just votes, though the coding problems are far more serious for the former than for the latter.

In addition, the implications of the Standard Pattern for (old-style) legal realism⁴⁶ and its opponents are not so clear. Are the observed

⁴² See Sunstein, et al, *Are Judges Political?* at 63–82 (cited in note 22) (discussing possible explanations).

⁴³ See, for example, Schanzenbach and Tiller, 75 U Chi L Rev at 743 (cited in note 15) (finding that a judge whose political affiliation aligns with the circuit court's partisan majority is more likely to depart from the Sentencing Guidelines); Max M. Schanzenbach and Emerson H. Tiller, *Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J L, Econ, & Org 24, 24 (2007) (finding that judges that are politically aligned with the circuit court tend to alter criminal sentences under the Sentencing Guidelines through law-based departures rather than fact-based adjustments); Joseph L. Smith and Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J Legal Stud 61, 62 (2002) (presenting evidence on the choice between law- and fact-based decisions in administrative law).

⁴⁴ See, for example, Steven J. Choi and Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J Legal Stud (forthcoming 2009) (reporting that federal judges are more likely to cite judges of their own political party, particularly in high-stakes litigation, and that judges are more likely to cite judges who cite them back); Michael Abramowicz and Emerson H. Tiller, *Judicial Citation to Legislative History: Contextual Theory and Empirical Analysis 2* (Northwestern University Law and Economics Research Paper No 05-11, May 2005) (reporting that the more judges of one political party on a circuit court or on a panel, the higher the rate of legislative history citations to legislators of that party, irrespective of the party of the judge authoring the opinion).

⁴⁵ See, for example, Cox and Miles, 108 Colum L Rev at 18–25 (cited in note 34) (examining how judicial ideology correlates with the application of multifactor tests in voting rights decisions); Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 Am Polit Sci Rev 305, 305 (2002) (developing a test for “jurisprudential regimes” that define relevant factors or set standards of review for subsequent decisions).

⁴⁶ We are understanding old-style realism in a stylized and not entirely accurate sense, as emphasizing the role of judicial preferences. For a more refined treatment, see Leiter, *American Legal Realism* at 52–56 (cited in note 6) (discussing the two branches of realism).

impacts of judicial ideology large or small?⁴⁷ Committed realists, emphasizing the importance of political judgments, will want to declare a clear victory. They will stress the evident disagreement, in many domains, between Republican and Democratic appointees—and thus point to the plain impact of political convictions on judicial decisions. But on the data as it stands, judicial policy preferences are only part of the picture.⁴⁸ In most domains, the division between Republican and Democratic appointees, while significant, is far from huge; the law, as such, seems to be having a constraining effect.⁴⁹ In review of agency decisions for arbitrariness, for example, both Democratic and Republican appointees vote in favor of validation most of the time, regardless of whether the outcome is liberal or conservative.⁵⁰

We are speaking, moreover, of the most contested areas of the law, where political differences are most likely to break out—and also of appellate cases, where the legal materials are likely to have a degree of indeterminacy. For those who believe in the rule of law, and in the discipline imposed by the legal system, the results of the New Legal Realism need not be entirely discouraging. The glass is half empty, perhaps, but it is also half full. There is much greater room here for conceptual and theoretical analysis.

The New Legal Realism also has jurisprudential implications, which warrant a great deal of further exploration.⁵¹ We cannot discuss those implications in this brief space. But consider, for example, Ronald Dworkin's account of law as a search for "integrity," through which judges seek both to "fit" and to "justif[y]" preexisting legal decisions.⁵² Dworkin's account suggests that disagreement about law operates along the dimensions of fit and justification. Sometimes a particular outcome, however appealing, will not fit precedent. Sometimes two or more possible outcomes show adequate fit, and the question is one of justification. (In Llewellyn's view, this was a standard situation.⁵³) How do these ideas bear on emerging evidence about agreements and disagreements within the courts of appeals?

⁴⁷ Unquestionably large effects can, however, be found in Ramji-Nogales, Schoenholtz, and Schrag, 60 *Stan L Rev* at 351–59 (cited in note 22) (reporting a significant effect of ideology within both courts and agencies).

⁴⁸ See Cross, 91 *Cal L Rev* at 1514 (cited in note 19).

⁴⁹ See *id.*

⁵⁰ See Miles and Sunstein, 75 *U Chi L Rev* at 767 (cited in note 24).

⁵¹ Valuable and relevant discussion can be found in Brian Leiter, *Naturalizing Jurisprudence* 183–99 (Oxford 2007).

⁵² See Ronald Dworkin, *Law's Empire* 254–58 (Belknap 1986).

⁵³ See Llewellyn, 3 *Vand L Rev* at 395–400 (cited in note 7) (arguing that there are many plausible ways to read a precedent or a statute and that a court must interpret the law in light of its purpose or objective).

A tempting reading of the empirical findings, and in particular of the Standard Pattern, is that Democratic and Republican appointees disagree along the dimension of justification. The high level of agreement between the two sets of appointees, in most domains, might be taken to show the disciplining power of “fit.” To the extent that Democratic and Republican appointees generally agree in cases involving disability and sex discrimination, or the arbitrariness of EPA and NLRB decisions, legal constraints may be the reason. Perhaps judges cannot do as they wish, and hence they follow the law. But in hard cases, perhaps “fit” runs out, and if so, it is not so surprising that Republican appointees will conclude that a stereotypically conservative position best justifies the law, and that Democratic appointees will disagree with that conclusion. For Democratic appointees, an interpretation of (say) the Equal Protection Clause that preserves space for affirmative action programs might best justify the existing decisions, while for Republican appointees, an interpretation that moves the law in the direction of race neutrality might best justify those decisions. We suspect that in the cases that involve large issues, disagreement across the two sets of appointees is best explained in this way.

An alternative view is that much of the time, the substantial overlap in view suggests that diverse judges actually agree in their judgments about both policy and principle. Perhaps “fit” is not doing as much work as it appears; perhaps justification is playing a significant role, but Republican and Democratic appointees agree on that issue. After all, the process of judicial selection imposes significant constraints on appointment to the federal bench, and it would not be surprising if agreement, even in controversial domains, stems from an underlying consensus within the federal judiciary. In administrative law, for example, many of the debates are fact-bound or highly technical, and it is unlikely that Republican and Democratic appointees will have strong disagreements about how the relevant disputes should be resolved. On this view, agreement among the judges reflects a fundamental consensus on questions of value, and “fit” may not be doing a great deal of work.

There are also questions about the role of jurisprudential commitments and their role in producing the patterns found by New Legal Realists. Perhaps Republican appointees are committed to following statutory texts, and perhaps textualism helps to account for some of those patterns.⁵⁴ In short, much more work needs to be done to under-

⁵⁴ Contrary evidence is provided, however, in Miles and Sunstein, 73 U Chi L Rev at 834 (cited in note 22) (showing political patterns that seem hard to explain in textualist terms).

stand the roles of fit and justification in the recent findings, and to see if other accounts, perhaps rejecting Dworkin's, do better.

II. THE NEW LEGAL REALISM MEETS ADMINISTRATIVE LAW

In recent years, we have been particularly interested in empirical tests of two of the largest questions in administrative law. (1) How do federal judges deal with agency interpretations of law?⁵⁵ (2) What is the role of judicial politics in reviewing agency action that is alleged to be arbitrary?⁵⁶

On both questions, the doctrinal instructions are reasonably clear. In the face of statutory ambiguity, judges are supposed to uphold reasonable agency interpretations.⁵⁷ This standard is designed to reduce the policymaking discretion of federal judges—and to ensure that the key political judgments are made by agencies instead.⁵⁸ It is therefore natural to wonder: are Republican appointees more likely to strike down liberal interpretations than conservative ones? Are Democratic appointees more likely to strike down conservative interpretations than liberal ones?

We have found that the answer to both questions is “yes.”⁵⁹ This finding raises serious questions about the proposition that current doctrine has succeeded in eliminating a large policymaking role for the federal judiciary.⁶⁰ We have also found that panel effects aggravate party differences. Republican appointees sitting on RRR panels look starkly different from Democratic appointees on DDD panels.⁶¹ The Standard Pattern can be found in this domain as well.

It is also important to know about the real world of arbitrariness review—about the actual rate of invalidation of agency action challenged as “arbitrary” (or as lacking substantial evidence) and about

⁵⁵ See *id.* at 823.

⁵⁶ See Miles and Sunstein, 75 U Chi L Rev at 791–92 (cited in note 24).

⁵⁷ See *Chevron*, 467 US at 866.

⁵⁸ See *id.* at 865 (noting that judges “are not part of either political branch of the Government” but that agencies may “rely upon the incumbent administration’s views of wise policy to inform its judgments” because the chief executive is “directly accountable to the people”).

⁵⁹ See Miles and Sunstein, 73 U Chi L Rev at 823 (cited in note 22).

⁶⁰ See *id.* at 867.

⁶¹ Notably, it is also possible to offer certain tests of the behavior of Supreme Court justices. We know which are relatively neutral, in the sense that their validation rates do not differ depending on whether the agency’s interpretation is liberal or conservative, and which are relatively restrained, in the sense that they tend to vote to uphold agency interpretations of law. We also know which are relatively partisan and which are relatively activist. See *id.* at 832 (detailing validation rates of individual justices). Fun facts: by our tests, Justice Breyer is the most restrained; Justice Kennedy is the most neutral; Justice Scalia is the most activist; and Justice Thomas is the most partisan. *Id.* These conclusions should be taken with many grains of salt, however, and we do not attempt to explore the complexities here.

the role of judicial policy preferences in decisions about whether agencies have behaved arbitrarily. Before we began, we asked several administrative law specialists and federal judges to predict the invalidation rate, and the answers were frequently, “I have no idea.” Some people, including some judges, guessed that the invalidation rate would be about 10 percent. We also asked several specialists, including judges, about whether Republican and Democratic appointees would show different patterns, and some of them answered, “probably not in this technical domain.” Studying cases involving the NLRB and the EPA, we have found that the invalidation rate is fairly high—36 percent—and that judicial policy preferences are playing a large role.⁶² We also found that Republican appointees are more likely to invalidate liberal decisions than conservative ones—and that Democratic appointees are more likely to invalidate conservative decisions than liberal ones. Indeed, we were surprised to see that our findings involving review of agency decisions for arbitrariness are quite close to our findings involving review of agency interpretations of law.

It is of course useful to bring empirical findings in contact with longstanding debates over existing doctrine. Peter Strauss, among the keenest participants in those debates, does not object to our methods or our findings, but he does offer an array of illuminating observations about what lessons to draw from them.⁶³ His most important doctrinal objection is that it is important to distinguish between “*State Farm* review” and review of the decisions of the NLRB for “substantial evidence.” By “*State Farm* review,” he means to refer to the relatively intensive hard look that the Court endorsed in *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co*;⁶⁴ substantial evidence review, he believes, is a different kettle of fish.

It is hazardous to disagree with Peter Strauss on doctrinal issues (or anything else), but as a purely doctrinal matter, we are not so sure that he is right. In *State Farm*, the Court purported to set out a general framework for assessing whether agency decisions are arbitrary—a framework that would seem to apply in many areas. And as an empirical matter, we are even less sure that Strauss is right. Indeed, we have produced an independent study of all court of appeals cases reviewing EPA and NLRB decisions and citing *State Farm*, and that study attests to the perceived generality of the Court’s framework.⁶⁵ The overall

⁶² See Miles and Sunstein, 75 U Chi L Rev at 767 (cited in note 24).

⁶³ See generally Strauss, 75 U Chi L Rev 815 (cited in note 5).

⁶⁴ 463 US 29, 34 (1983).

⁶⁵ See Thomas J. Miles and Cass R. Sunstein, *The Hard Look in Practice* 5–6, 10 (unpublished manuscript, 2007). Full disclosure: We began our investigation into arbitrariness review with this study, limited to cases citing *State Farm*. But we concluded that the number of such

validation rate in cases citing *State Farm* was slightly lower—51 percent—than among cases not citing *State Farm*, but it is difficult to generalize about this difference because the number of cases citing *State Farm* was small (87). More importantly, we observed that when the court cited *State Farm*, political commitments influenced the operation of judicial review in much the same way as they did when the court did not cite it. The validation rates of Democratic and Republican appointees showed the familiar seesaw pattern, rising when the nature of the agency decision aligned with the political party of the appointing president and falling when it did not.⁶⁶ Panel effects were also substantial. Democratic appointees showed higher liberal voting rates (64 percent) when sitting with at least one other Democratic appointee. Republican appointees showed lower liberal voting rates (39 percent) when sitting with at least one other Republican appointee. The resulting difference between the two sets of appointees—25 percent—is comparable to our findings in the set of decisions that did not cite *State Farm*.

True, it is reasonable to ask whether *State Farm* review, announced in a case reviewing a high-profile exercise in rulemaking, is the same as substantial evidence review of more mundane questions of fact and policy generally raised by NLRB orders. But judicial review of such orders is undertaken under the standards established by *Universal Camera Corp v NLRB*⁶⁷ and *Allentown Mack Sales and Service v NLRB*,⁶⁸ and those standards are relatively stringent in a way that is not easy to distinguish, in principle, from *State Farm* review. In short, we do not think that *State Farm* carves out a separate “kind” of judicial review of agency action, distinguishable from ordinary arbitrariness review or from substantial evidence review. We think that *State Farm* offers the state-of-the-art account of arbitrariness review,

cases did not provide a representative sample of arbitrariness cases and was in any case too small for a detailed examination of panel effects, so we compiled a more comprehensive data set instead.

⁶⁶ When the agency decision is liberal, the rate at which Democratic appointees voted to validate under *State Farm* was 61 percent and for Republican appointees, it was 47 percent. When the agency decision is conservative, the Democratic validation rate dropped to 40 percent and the Republican validation rate rose to 57 percent. For both Republican and Democratic appointees, then, the spread between liberal and conservative agencies was significant when *State Farm* was cited. Notably, however, it was significantly higher for Democratic appointees (21 percent) than for Republican appointees (10 percent). *Id.* at 5.

⁶⁷ 340 US 474, 489 (1951) (noting that the adoption in the APA of the judicially constructed “substantial evidence” standard of review was a response to pressures for “stricter and more uniform” review of agency decisions).

⁶⁸ 522 US 359, 364 (1998) (requiring courts to defer to the requirements imposed by the NLRB as long as they are “rational” and the Board’s explanation of them is not “inadequate, irrational, or arbitrary”).

and we are willing to speculate that substantial evidence review is not meaningfully different as a doctrinal matter.⁶⁹

Strauss is correct, however, to point to an array of distinctive features of NLRB orders. Suppose that he is therefore right to say that EPA cases and NLRB cases are relevantly different. It remains true that most of the patterns found in the one domain can be found in the other as well. The real world of judicial review of EPA decisions appears to be quite close to the real world of review of NLRB decisions. We hope that in the future, others will explore whether those patterns apply to other agencies as well.

But Strauss's largest claim lies elsewhere. He contends that our major "point" is to show that hard look review should be softened⁷⁰ — that the Court should rethink *State Farm* to the extent that it invites the kinds of policy-driven judicial oversight that our evidence reveals. But our major "points" are empirical, not normative. We sought to understand the real world of arbitrariness review, not to change it. To be sure, we do read our data to suggest the need to reduce the role of judicial policy preferences in review of agency action. We do not approve of a situation in which Republican appointees are invalidating liberal agency decisions at a high rate, or Democratic appointees are invalidating conservative agency decisions at a high rate. If agency decisions really are arbitrary, they should be struck down. But it is reasonable to worry that on DDD panels, conservative decisions are being wrongly invalidated as arbitrary—and that the same is true for liberal decisions reviewed by RRR panels. Moreover, the size of the ideological effect in these arbitrariness cases is about as large as that seen in other areas of law.⁷¹

But we are also interested in considering the possibility of softening the current hard look, if only because such softening should increase the likelihood that judges will invalidate agency decisions only when they are genuinely arbitrary. A softer look should ensure that judicial policy preferences do not, in the end, account for invalidation on arbitrariness grounds. But Strauss is correct to say that our findings are not sufficient to justify any such softening. We need to know what would be lost as well as what would be gained. Hard look review probably serves as an important ex ante deterrent and ex post corrective to bad decisions that are rooted in insufficient care, interest-group

⁶⁹ Of course it is likely that the stringency of review will vary depending on a range of factors, including the technical quality of the issues and whether the agency has a strong or weak reputation.

⁷⁰ See Strauss, 75 U Chi L Rev at 829 (cited in note 5).

⁷¹ See, for example, Sunstein, et al, *Are Judges Political?* at 20–21 (cited in note 22) (tabulating ideological effects for a variety of cases, including those involving the NLRB).

pressures, or political commitments that override sound analysis.⁷² A relaxation of judicial review could produce more genuine arbitrariness even as it reduced the risk that judicial policy preferences would play a role in invalidation of agency action. We do not mean to take a final stand on whether arbitrariness review should be softened.

III. WHITHER THE NEW LEGAL REALISM?

In 1931, Llewellyn asked for a “*temporary* divorce of Is and Ought” in the realist study of law.⁷³ But the need for a just legal system is urgent; it cannot wait until researchers achieve a comprehensive understanding of the “Is.” Legal academics and the lawyers they train must often make normative evaluations of legal rules and institutions on the basis of only partial information.⁷⁴ They ought to do so with full awareness of the limitations of their analyses, and we hope that we have done so as well. We do not place such faith in our statistical analysis as to claim that it offers anything like an adequate basis for suggesting reforms or new practices,⁷⁵ but we are willing to offer some tentative speculations.

Professor Strauss raises the possibility of mandatory judicial diversity.⁷⁶ Any such mandate would generate many questions, but we

⁷² See Strauss, 75 U Chi L Rev at 825 (cited in note 5). See also Cass R. Sunstein, *Deregulation and the Hard-look Doctrine*, 1983 S Ct Rev 177, 177 (“The electoral process has proved insufficient to discipline agency decisions, and courts have rejected the notion that political supervision is an adequate safeguard against unlawful or arbitrary failure to regulate.”); William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L J 38, 60 (1975) (“It is a great tonic to a program to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review [inside the bureaucracy] . . . the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology.”).

⁷³ See Llewellyn, 44 Harv L Rev at 1236 (cited in note 1) (arguing that observations should remain uncontaminated by the desires and value judgments of the observer).

⁷⁴ See Jack Goldsmith and Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U Chi L Rev 153, 164–65 (2002) (noting that due to limited resources, there exists a tradeoff between accuracy through perfect information and timeliness and relevance). Barry Friedman has even criticized studies of judicial decision for too often lacking “normative bite.” See Friedman, 4 Perspectives on Polit at 262 (cited in note 13) (“What matters, at bottom, is whether the positive scholarship has something to teach about how law and legal institutions operate in a way that is pertinent to how they should, and to the aspirations put upon those institutions by society.”).

⁷⁵ But see generally Stephen J. Choi and G. Mitu Gulati, *A Tournament of Judges?*, 92 Cal L Rev 299 (2004) (proposing a system of elevating judges to the Supreme Court based on judicial performance, which would be measured by criteria such as opinion publication rates, citations by courts and academics, and speed of disposition of cases); Stephen J. Choi and G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S Cal L Rev 23 (2004) (ranking circuit court judges according to the system proposed in the previous article).

⁷⁶ See Strauss, 75 U Chi L Rev at 826 (cited in note 5) (“Could one imagine resulting legislation requiring three-judge court of appeals panels to be composed not at random, but—to the

can show, in both *Chevron* and arbitrariness cases, that our findings of political judging are driven almost entirely by what happens on DDD and RRR panels. Strikingly, there is little difference, in both domains, in how Republican appointees vote on RRD and RDD panels, and Republican appointees, on such panels, look quite similar to Democratic appointees on the same panels. To put the point more starkly, the voting patterns of Democratic appointees look about the same on DDR panels as on DRR panels, and those of Republican appointees look about the same on RRD panels and on RDD panels. Moreover, the voting patterns of Democratic appointees on DDR and DRR panels look about the same as those of Republican appointees on RRD and RDD panels. In a way, this finding is a stunning tribute to the power of the rule of law. In administrative law cases at least, the role of political judging is sharply diminished on mixed panels. If we take ideological voting together with ideological amplification, the New Legal Realists might be prepared to be suspicious, on normative grounds, of what is likely to happen on RRR or DDD panels.

The remedy is not clear. Knowledge sometimes provides a degree of inoculation and, on an optimistic view, judicial awareness of the risks associated with unified panels might provide a safeguard. If a DDD panel finds itself striking down a conservative regulation as arbitrary, or if an RRR finds itself doing the same with a liberal regulation, there is a good reason for every member of the panel to pause and rethink. It also makes sense to consider en banc review in cases in which unified panels go in the predicted direction—and for the Supreme Court to consider such cases to be unusually promising ones for grants of certiorari.

In the domain of administrative law, however, our major submission is empirical, not normative: policy judgments by federal judges significantly affect appellate rulings about whether an agency action is arbitrary. In the future, bolder normative claims may be possible for many questions. An immense amount of material has long been available with which to test hypotheses about the sources of judicial behavior. The New Legal Realism remains in its infancy. As it grows, we will learn much more.

extent feasible—as mixtures of judges who had been appointed in different Presidencies, perhaps even in Presidencies of different parties?”). See also Schanzenbach and Tiller, 75 U Chi L Rev at 744–45 (cited in note 15) (contemplating hierarchical judicial diversity).